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Specific Performance, Inadequacy or Consideration as Ground for Denying Decree of

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have the same effect.⁸ Under this, the plaintiff argued the negligence of the defendant before marriage gave the plaintiff a cause of action against him, a "thing in action" and therefore a right of property and when the defendant married the plaintiff it became her separate property right. The court stated that as used in the Married Women's Property Act this extended meaning could not be given. The word "property" in the act must be read in the light of its general policy so far as any policy at all can be inferred from it. The defendant did not destroy the plaintiff's property in the ordinary sense but to infringe upon her right of personal safety and security. Goods would be property in the true sense.

The English court has undoubtedly given this construction to a "chose in action" because it was deemed to reach the desirable result in not permitting the wife to sue her husband. If this were an action against a third party it is clear the marriage would have no effect and the right could properly be called a property right within the act. In the West Virginia case of *Stevens v. Friedman*⁹ it was held that the marriage of a female plaintiff pending an action brought by her for personal injuries is not cause for abatement of the action.

The interpretation given the meaning of property in the English case indicates a strong tendency to refuse actions in tort by the wife against the husband. The conclusion reached is satisfactory despite the reasoning employed to support it.

—JEROME KATZ.

SPECIFIC PERFORMANCE, INADEQUACY OF CONSIDERATION AS GROUND FOR DENYING DECREE OF.—In the recent case of *Weeks v. Pratt et al.*,¹ decided in the United States Circuit Court of Appeals for the Fifth Circuit, plaintiffs, (the Pratts), sued for specific performance of an contract into which they had entered with defendant, who had invented a fuel-saving device for internal

own name against all persons whomsoever, including her husband, the same civil remedies for the protection and security of her own separate property."

⁸ W. VA. REV. CODE (1931), c. 48, art. 3, § 1. "The separate property, real and personal, of a married woman, heretofore acquired . . . shall be and remain her sole and separate property in all respects as if she were a single woman." It was held in *Clay et ux. v. City of St. Albans*, 43 W. Va. 539 (1897) that a married woman may sue alone or she and her husband together, at law or equity, in any action or suit concerning her separate property.

⁹ 58 W. Va. 78, 51 S. E. 132 (1905).

¹ 43 F. (2d) 53 (1930).

combustion engines and a substitute for gasoline to be used therewith. Under the terms of the contract plaintiffs were to pay \$100,000 into the corporation to be formed for which they were to receive 49 per cent of the common stock and a portion of the preferred stock. Defendant was to turn over his inventions to the company, receive reimbursement for his expenses incurred theretofore, 51 per cent of the common stock, and 12,500 of the 25,000 shares of preferred stock. Defendant was to select a majority of the board of directors and plaintiffs the rest, but a provision was inserted whereby a vote of two-thirds of the board was necessary in order to take any important action. There was evidence that defendant had been offered up to \$1,350,000 by oil companies for his invention but had refused them, wishing the public to be benefited instead of his invention suppressed. There was also evidence that the inventions were estimated to be worth from \$40,000,000 to \$1,000,000,000. These unusual facts constitute the chief interest of the case.

In its opinion the court makes the statement that "*In such case the inadequacy of consideration would prevent the specific enforcement of the contract, regardless of whether actual fraud be shown.*"² At first glance this statement appears to be contrary to the generally accepted view that inadequacy of consideration alone is not sufficient defense to a suit for specific performance but that additional factors are essential.³

Before the words under consideration were used the court had been discussing the fact that, through the provision of the contract necessitating a two-thirds vote of the board of directors, defendant was unwittingly deprived of control over his inventions, a result of the unequal bargaining powers between plaintiffs and defendant, the former clever promoters, and the latter a retired railroad engineer. The court's statement, beginning with the words "in such case", clearly shows that the rule (if it be considered such) is meant to be limited to cases where other factors in addition to inadequacy of consideration are present.

² Italics ours.

³ Perhaps the best statement of the present rule to be found is in 5 POMEROY, EQUITY JURISPRUDENCE (2d ed. 1919) 4952, § 2212 (790):

"The usual statement of the modern rule is that mere inadequacy of consideration is not such hardship as will prevent specific performance, unless the inadequacy is so gross as to shock the conscience of the court and amount to decisive evidence of fraud. *** In a few modern cases equity has refused relief on the ground of mere gross inadequacy, such disproportionate advantage to the plaintiff that it 'shocks the conscience of the court.' But courts generally do not admit this exception, but do

The court cites *Marks v. Gates*⁴ as authority for the statement, and that case was one in which, along with gross inadequacy of consideration, there was the additional factor of improvidence on the part of the party defending in specific performance.

Therefore, it seems reasonably clear that the court's words are in accord with prior adjudications; and, in view of the circumstances of the case,⁵ such weight should be given them.⁶

—SIDNEY J. KWASS.

TAXATION—STATE TAX ON GASOLINE CONSUMED IN STATE AS BURDEN ON INTERSTATE COMMERCE.—In the case of *United States Airways, Inc., et al. v. Shaw, State Auditor*¹ in which the facts as agreed, were: The plaintiff operated an interstate and intrastate air mail and passenger line, using gasoline as motive power for its

give much weight to inadequacy when coupled with other evidence of hardship as some degree of inequality, improvidence, etc.”

Also see WALSH, TREATISE ON EQUITY (1930), 482 *et seq*; FRY, SPECIFIC PERFORMANCE (6th ed., NORTHCOTE, 1921), c. 7; POMEROY, SPECIFIC PERFORMANCE (2d ed. 1897), 271 *et seq*; CLARK, PRINCIPLES OF EQUITY (1919), 171, § 128. For requisites to obtain a decree of specific performance, see 4 POMEROY, EQUITY JURISPRUDENCE (2d ed. 1919) 3330, § 1405.

¹154 Fed. 481, 483, 14 L. R. A. (N. S.) 317, 12 Am. & Eng. Ann. Cas. 120, (1907), where the court used the following language:

“ . . . in general that mere inadequacy of consideration is not of itself ground for withholding specific performance unless it is so gross as to render the contract unconscionable. But where the consideration is so grossly inadequate as it is in the present case, and the contract is made without any knowledge at the time of its making on the part of either of the parties thereto of the nature of the property to be affected thereby, or of its value, no equitable principle is violated if specific performance is denied, and the parties are left to their legal remedies, if any they have.”

Also see the notes to the case as reported in L. R. A. and Am. and Eng. Ann. Cases.

⁵In addition to the grounds discussed above the court stated that there was another reason for denying the decree which was that defendant had contracted to serve the company personally, and that it would not enforce only a part of the contract except where it could be enforced without changing the contract in any essential particular, and that here the part providing for defendant's personal services was unenforceable and indivisible from the rest of the contract.

⁶The West Virginia cases, too, seem in accord with the general weight of authority, though some of them deal with rescission of contracts on grounds of inadequacy of consideration plus other factors, and others are merely dicta. See: *Hale v. Wilkinson*, 21 Gratt. 75 (Va. 1871); *Conway v. Sweeney*, 24 W. Va. 643 (1884); *Duncan v. Duncan*, 104 W. Va. 600, 140 S. E. 689 (1927); *Garten v. Layton*, 76 W. Va. 63, 84 S. E. 1058 (1915) (*rescission*); *Crotty v. Effler*, 60 W. Va. 258, 266, 54 S. E. 345 (1906); *Whittaker v. S. W. Va. Improvement Co.*, 34 W. Va. 217, 12 S. E. 507 (1890); *Pennybacker v. Laidley*, 33 W. Va. 624, 639, 11 S. E. 39 (1890) (*rescission*).

¹ 43 Fed (2d) 148 (D. C., W. D. Okla. 1930).